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Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

Jamal Dawood

Petitioner

v.

State of California,

Respondent

On Petition for Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District, Division Two

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Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

1. Does due process of law under the 14th Amendment permit the State, over objections, to draw from its investigator witnesses in a fraud case purported expert testimony that all the evidence in the case is "consistent with fraud" and "identify theft profile evidence."

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jamal Dawood respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal.

I. OPINION BELOW (Rule 14.1(d))

The unpublished opinion of the California Court of Appeal [hereafter "COA"] opinion is attached and cited as the "Appendix A" to this petition.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

Petitioner's conviction was affirmed by the California Court of Appeal in People v. Dawood, E033792, on February 14, 2005. *See* Appendix, pp. 1-24. A petition for review was denied on May 18, 2005 by the California Supreme Court. S132413. The denial was without prejudice to a sentencing issue not relevant to this petition -- whether Blakely v. Washington, 542 U.S. 296 (2004) impacted California consecutive sentencing. The California Supreme Court subsequently held it did not. *See* People v. Black, 35 Cal.4th 1238 (2005). The order is attached and found at Appendix 25 to this petition. The jurisdiction of this court is based upon 28 U.S.C. 1257(a).

III. CONSTITUTIONAL PROVISIONS (Rule 14.1(f))

United States Constitution, Fifth Amendment, provides in part that : "... no person shall be compelled in any criminal case to be a witness against himself." It also guarantees that no person be denied due process of law.

United States Constitution, Sixth Amendment, provides a guarantee of the right to a jury trial.

United States Constitution, Fourteenth Amendment, guarantees that these constitutional rights shall be respected in

the various states.

IV. STATEMENT OF THE CASE (Rule 14.1(g))

For the purpose of this petition, petitioner accepts the statement of facts set forth in the COA opinion. Opn., pp. 1-8. Petitioner, a medical doctor and surgery resident at Stanford University at the time of his arrest in February 2000 (CT[1] 732), was convicted of theft-related felonies regarding two persons, Carlos Martinez and John Ferguson. After trial, the jury convicted on the nine counts, rejected other counts, and found not true the State's allegation that over $50,000 was illegally taken.

The Riverside County District Attorney's Office filed its first information on April 29, 2001 (CT 55), charging petitioner and others with conspiracies, identity theft and related offenses. Three amended informations were filed. CT 352. The charges of conviction, counts 1-9, were:

Carlos Martinez Loan (Counts 1-7). The prosecution asserted that petitioner and others attempted to obtain a $68,900 car loan with USAA Bank in the name of Martinez (the purported buyer of the car), but that Martinez was in no way involved.

Count 1 (§530.5(a))[all statutory references to the California Penal Code], charged obtaining the personal identity information of Carlos Martinez without authorization and using that information to try and obtain an $68,900.00 loan from USAA Federal Savings Bank. CT 352-353.

Count 2 (§182(c)(1)), charged conspiracy with another to commit the crime charged in Count 1. CT 353.

Count 3 (§§ 664/532(a)), charged attempting to defraud

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[1] "CT" stands for State court Clerk's Transcript, "RT" for the State court reporter's transcript of the trial.

USAA Bank of money by taking possession of money from the Bank (t' · Martinez loan.) CT 353-354.

nt 4 (§182(a)(1)), charged conspiring to commit the crime of defrauding another of money in violation of Penal Code § 532(a), again to obtain the Martinez loan. CT 354.

Count 5 (§470(b)), charged counterfeiting the handwriting of Martinez on January 28, 2000, with the intent to defraud. CT 354-355. This count was based on a controlled delivery of USAA loan documents to 24354 Millsap Street in Moreno Valley, the address on the loan application submitted to USAA Bank in the name of Carlos Martinez. Property tax records indicated the home belonged to Magdy Mikhail. RT 3321. Petitioner drove to that home with his brother, Ronnie and signed for the document as Carlos Martinez. RT 3326.

Count 6 (§470(b)), charged forging the handwriting of another, Carlos Martinez, on February 7, 2000, with the intent to defraud. CT 355. On February 4, 2000, Postal Agent Timar, posing as a postal delivery person, went to the Millsap address, this time with a loan check. There, a male (not petitioner) said he was Carlos Martinez but he refused to sign for the express mail. RT 3330. Timar left a notice that the package could be picked up at the post office. RT 3331. On February 7, 2000, petitioner appeared at the Post Office with his brother Ronnie and Wagdy Dawood. Wagdy went to the counter and gave his name as Carlos Martinez to retrieve the loan package. RT 3333-3334.

Count 7 (§475(c)), charged possessing the completed $68,900 USAA Bank check given at the Post Office with intent to utter and pass it in order to defraud. CT 355.

John Ferguson Loan (Counts 8 & 9). The next two counts involved John Ferguson as the alleged victim. Ferguson testified he volunteered to take part in a "paper loan" with USAA Bank to build up his credit, but despite signing the loan documents did not believe he was actually

obligated to make payments or that the loan was tied to a car purchase.

Count 8 (§532(a)), charged that by false pretenses, the USAA bank was defrauded on August 18, 1999 of the $50,000 loan to John Ferguson. (CT 355.)

Count 9 (§182(a)(1)/§532(a)), charged a conspiracy to defraud the USAA bank of money (the Ferguson loan) in violation of § 532(a). (CT 355-356.)

The above are the counts of conviction. There were three other counts related to Ferguson. CT 356-357. On two, petitioner was acquitted: Counts 10 and 11. The jury hung on Count 12. CT 621-622.

As will be shown, to prove these charges, the prosecution used to experts to identify the seized and subpoenaed evidence and label it as a "consistent with fraud" and guilt profile evidence.

V. SUMMARY OF ARGUMENT

The state court approves government law enforcement investigating agents to testify as evidence labeling experts. The label? "Guilty as charged." In this case, the prosecutor called two law enforcement employees as its labeling experts. One was a prosecution financial analyst who testified over objection that the financial and other evidence in the case was all "consistent with fraud." Another agent testified over objection that all thirty five boxes of materials seized in various searches tied to petitioner's investigation were identity theft profile evidence.

The Opinion found no error in this testimony. App. 8-9. The two law enforcement employees were allowed to brand literally all of the voluminous physical evidence in the case as guilt evidence, thus inverting the presumption of innocence to one of guilt and shifting the burden of proof to petitioner to

remove the guilt labels. This was a practical impossibility given that much of physical evidence was never specifically identified by the agents during the trial but simply labeled as boxes of "profile evidence" or evidence "consistent with fraud."

To grant the State such power to home grow evidence labeling "experts" who opine to the jury that all the evidence is guilt profile evidence as well as consistent with guilt usurps the role of the jury, denies a due process of law fair trial and the right to a jury trial. "The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Given the resources of the State to home grow State employee investigators as "expert" witnesses to parrot the prosecution guilty theme, permitting this in a court of law is an arbitrary and unfair criminal procedure. This Court has stated that when an "unacceptable risk is presented of impermissible factors coming into play" inherent prejudice to a defendant's constitutional right to a fair trial results. Holbrook v. Flynn, 475 U.S. 560, 570 (1986).

ARGUMENT

1. The State Denies Due Process of Law By Allowing Law Enforcement Agents to Give Expert Labeling Testimony that All Physical Evidence is Evidence of Guilt.

> "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence."[2]

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[2] Bruton v. United States, 391 U.S. 123, 132 fn. 6 (1968).

State court evidentiary rulings generally do not rise to the level of due process violations. However, they are constitutional violations when they "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Montana v. Egelhoff, 518 U.S. 37, 43(1996) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)); *see also* Spencer v. Texas, 385 U.S. 554, 563-64 (1967).

More specifically, this Court has held that certain procedures used in state courts can put fair trials at an unacceptable risk such as in compelling a defendant to wear jail garb during a guilt trial (Estelle v. Williams, 425 U.S. 501, 505 (1976)), or during a capital sentencing trial. Deck v. Missouri, 125 S.Ct. 2007 (2005).

Government court procedures that deny a fundamental "sense of fair play and decency" also deny due process. Rochin v. California, 342 U.S. 165, 173 (1952). An American courtroom will not permit admission of such police-manufactured expert "evidence." Just as in Alcorta v. Texas, 355 U.S. 28 (1957), where this Court found a violation of due process when the State had presented a "false impression" of a key prosecution witness's credibility, here the State's use of two of its employee witnesses as experts to introduce subpoenaed or seized evidence and label it all guilt evidence must be prohibited. *See e.g.*, U.S. v. Harber, 53 F.3d 236 (9th Cir. 1995) (reversal required where case agent's report containing a summary of his investigation and his opinion that the suspects were guilty mistakenly given the jurors).

In U.S. v. Scheffer, 523 U.S. 303, 313 (1998), this Court upheld a statute which banned polygraph evidence at trial. In so holding, the court observed that the fundamental premise of our criminal trial system is that "the jury is the lie detector," and that the determination of the weight and credibility of witness testimony belongs to it. So too here. By

their very nature, police agent opinions that all the evidence is evidence of guilt undoubtedly diminishes the jury's role in making factual determinations because of the excessive weight awarded the opinions of the investigating police officers.

Petitioner has no issue with the prosecution introduction of evidence, but it cannot have "experts" affix guilt labels to it. The global labels used here were purely prejudicial conclusions. Conclusions of guilt or innocence are for the jury to make. By the massive guilt labeling that occurred in this case, petitioner was denied his right to a fair trial.

A. What the Profile Expert Was Allowed to Say Over Objection. The trial court stated, "I have been somewhat lenient in allowing the profile testimony." (RT 3517.) Indeed, the trial court was far too generous. Agent Timar, a U.S. Postal investigator, testified that a vast amount of the seized evidence was the type of "profile evidence" found in identity theft cases. She testified:

> **Profile evidence is evidence we find frequently in identity theft investigations** which involves recordings, either handwritten, on computer, or typewritten, of names, addresses, dates of birth, mother's maiden name, social security numbers. All the information that would be required to apply for credit in someone else's name. RT 3449; emphasis added.

She testified such profile evidence was found in all the 30 to 35 boxes taken from all the residences searched (RT 3585-3586), and **"all of this information that [she]... gathered ... relating to [petitioner] Jamal Dawood is profile evidence."** RT 3569; emphasis added.